

JUN 22 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1990

JAMES A. FORD,

Petitioner,

v.

GEORGIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Georgia

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed April 15, 1988
Certiorari granted April 23, 1990

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RELEVANT DOCKET ENTRIES

Chronology of Relevant Events

- 9/5/84 Indicted.
- 10/9/84 Motion to Restrict Racial Use of Peremptory Challenges filed.
- 10/12/84 Motion to Restrict Racial Use denied.
- 10/22/84 Jury selection.
- 10/23/84 Trial.
- 10/23/84 *In Camera* argument on motion "to the state's using all their strikes to strike blacks from being on the jury; no whites being struck, all blacks being struck."
- 10/25/84 Mr. Ford was found guilty and sentenced to death.
- 11/26/84 Motion for a new trial filed.
- 1/7/85 Amended motion for a new trial filed.
- 1/18/85 Argument on the motion for a new trial.
- 2/19/85 Motion for a new trial was denied.
- 3/14/85 Notice of appeal filed in the Georgia Supreme Court.
- 6/4/85 Oral argument.
- 10/29/85 Georgia Supreme Court affirmed death sentence.
- 2/23/87 Order of the Supreme Court of the United States vacating & remanding to the Georgia Supreme Court for further consideration in light of *Griffith v. Kentucky*.

11/30/87 Order of Georgia Supreme Court affirming death sentence.

12/16/87 Rehearing denied, Georgia Supreme Court.

IN THE SUPERIOR COURT OF COWETA COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,)	
Plaintiff,)	INDICTMENT
)	NO. 4862
VS.)	filed
JAMES FORD,)	October 9, 1984
Defendant.)	

MOTION TO RESTRICT RACIAL USE OF
PEREMPTORY CHALLENGES

Now comes JAMES FORD, the Defendant in the above styled action, and moves the Court to restrict the Prosecution from using its peremptory challenges in a racially biased manner that would exclude members of the black race from serving on the Jury. In support of this Motion, the Defendant shows:

1.

The Prosecutor has over a long period of time excluded members of the black race from being allowed to serve on the Jury where the issues to be tried involve members of the opposite race.

2.

This case involves a black accused and the victim is a member of the white race.

3.

It is anticipated that the Prosecutor will continue his long pattern of racial discrimination in the exercise of his peremptory strikes.

4.

The exclusion of members of the black race in the jury when a black accused is being tried is done in order that the accused will receive excessive punishment if found guilty, or to inject racial prejudice into the fact finding process of the jury. See *McCray vs. New York*, ___ U.S. ___, 33 Cr. L. 4067 (82-1381, May 31, 1983). *Taylor vs. Louisiana* (sic), 419 U.S. 522 (1975).

WHEREFORE, the Defendant prays that this Court enter an Order granting the relief requested herein.

WOOD, ODOM & EDGE, P.A.

BY: Arthur B. Edge, IV
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Motion Denied
10/12/84
WFL

IN THE SUPERIOR COURT OF COWETA COUNTY
STATE OF GEORGIA

(Caption Omitted In Printing)

filed November 26, 1984

MOTION FOR NEW TRIAL

Verdict and judgment for the State at the Present Term, of the Superior Court of Coweta County, State of Georgia, on October 25, 1984.

The defendant being dissatisfied with the verdict and judgment in said case, and within thirty (30) days from said trial, moves the court for a new trial upon the following grounds, to wit:

1. Because the verdict is contrary to evidence and without evidence to support it.
2. Because the verdict is decidedly and strongly against the weight of the evidence.
3. Because the verdict is contrary to law and the principles of justice and equity.
4. Defendant specifically moves the Court to allow him to reserve the right to amend this motion for a new trial after the transcript has been completed, and the Defendant and his attorney have had a reasonable amount of time to review the transcript and urge such error as may be reflected to the Court.

WHEREUPON the defendant prays that these grounds for a new trial, be inquired of by the Court and that a new trial be granted.

/s/ Nelson Jarnagin
NELSON JARNAGIN
 Attorney for Defendant

IN THE SUPERIOR COURT OF COWETA COUNTY
 STATE OF GEORGIA

(Caption Omitted In Printing)

filed January 7, 1985

AMENDMENT TO MOTION FOR NEW TRIAL

COMES NOW JAMES FORD the defendant above-named, by and through undersigned counsel, and amends his previously filed Motion for New Trial by adding the following grounds:

1.

The trial court erred in denying the relief requested in defendant's pre-trial motions; specifically the following motions:

- (a) For individually sequestered voir dire;
- (b) For additional peremptory challenges;
- (c) To strike and quash the Georgia death penalty statutes;
- (d) To strike and quash the death qualification voir dire;
- (e) To suppress the defendant's statements; and
- (f) For a change of venue.

2.

Defendant's right to an impartial jury as guaranteed by Sixth Amendment to the United States Constitution

was violated by the prosecutor's exercise of his peremptory challenges on a racial basis.

3.

Defendant was denied due process of law as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution by the trial court's impermissible comments during the course of defendant's trial.

4.

Defendant was denied due process of law as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution by the prosecutor's impermissible argument in the penalty phase of defendant's trial.

5.

Defendant's trial counsel did not render reasonably effective assistance during his trial in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

WHEREFORE, defendant prays that these his grounds for a new trial, be inquired of by the Court and that a new trial be granted.

HARVEY AND JARNAGIN

By: /s/ Bruce S. Harvey
BRUCE S. HARVEY
 Attorney for Defendant

IN THE SUPERIOR COURT OF COWETA COUNTY
 STATE OF GEORGIA

(Caption Omitted In Printing)

ORDER

The Defendant's Motion for New Trial having come on for consideration and having been heard, it is hereby CONSIDERED, ORDERED and ADJUDGED:

That the Defendant's Motion for New Trial is hereby denied on each and every ground.

SO ORDERED this 19th day of February, 1985.

/s/ William F. Lee, Jr.
WILLIAM F. LEE, JR.
 JUDGE SUPERIOR COURT
 COWETA JUDICIAL
 CIRCUIT

IN THE SUPERIOR COURT FOR THE
COUNTY OF COWETA
STATE OF GEORGIA

(Caption Omitted In Printing)

EXTRACT OF TRANSCRIPT OF MOTION TO RESTRICT
RACIAL USE OF PEREMPTORY CHALLENGES
(October 12, 1984)

[160] Now in the area of jury selection there's still the question of the motion to restrict racial use of per-emptory challenges. Mr. Edge, I have read the motion and will now hear your argument on it.

MR. EDGE: Your Honor, in so far as evidence goes, I just would like to state in my place that it's been my [161] experience, and the Court is aware that the district attorney and the other assistant district attorneys have a history and a pattern when you have a defendant who is black, of using their per-emptory challenges to excuse potential jurors who are also black. We are requesting the Court to require the district attorney, if he does use his per-emptory challenges to excuse potential black jurors, to justify on the record the reason for his excusing them. His failure to do so we feel would evidence the fact that he is using them in a discriminatory manner, that is, excusing jurors solely because they are black and for no other reason.

THE COURT: Any response, Mr. Sullivan?

MR. SULLIVAN: As Mr. Edge also stated in his place what he stated; I would like to point out that he cannot state in his place why the district attorney may have struck a juror who happened to be black. He doesn't

know whether this was because of his occupation or whether or not they sometimes have even raised their hands and appear unable to hear and things like that. I can state in my place and I think Mr. Edge would agree with me, that in practically every trial we have in this county there are always blacks on trial juries, and an all white jury is rare in any county. I'd like to point out for the record that Mr. Edge has twenty strikes and the State has ten and he noticed from an earlier motion there is a proper percentage of blacks in the jury box. I would point out to the Court [162] the case of Swain versus Alabama which I'm sure the Court is familiar with at 380 U.S. 202, which is a Supreme Court case that says, the per-emptory challenge system goes back to the common law and it would be an unreasonable burden to require an attorney for either side to justify his use of per-emptory challenges; as in fact the purpose of per-emptory challenges enables either lawyer to strike somebody because they have blue eyes. If this is the particular reason he wants to do that today, I would appose (sic) the motion, and I must object to the statement that was made too.

THE COURT: I will just state for the record that in almost every, I would say almost ninety percent, of the felony cases tried in the circuit I have a jury list before me and I follow along to see which side and who is striking who, and I can't sit here and tell you the number, but I would say in numerous or several cases I've seen cases in which there are, have been black defendants and the district attorney's office has struck perspective (sic) white jurors and left perspective (sic) black jurors on the jury. I have seen that happen here and in other counties in the circuit. I have seen also, not only when there are black

defendants like in this particular case, but I have seen it done and I can't sit here and document them and I have not documented them, but it's been on more than one occasion. I have seen it done as much as several occasions. I don't know why. May be it just happens because the person struck was just [162] real sorry or for one reason or another. I don't know, but I have seen that take place and I'm taking that into consideration among other things and denying the motion to restrict racial use of per-emptory challenges.

Now that takes care of the motions that have been made in connection with the jury selection process. I don't mean by the jury commission, I mean during the actual trial itself.

• • • •

IN THE SUPERIOR COURT FOR THE
COUNTY OF COWETA
STATE OF GEORGIA

(Caption Omitted In Printing)

EXTRACT OF TRANSCRIPT OF THE PROCEEDINGS
DISCUSSING JURY SELECTION
(October 22, 1984)

• • • •

[166] (After a brief recess the selection of a jury began.)

THE COURT: We'll now proceed to strike a jury. We'll strike by numbers, first on the State and then on the defendant.

(Whereupon the selection of a jury began until a jury was struck and then an alternate was picked and the jury was sworn by the Court.)

• • • •

[167] THE COURT: All right. Mr. Bailiff, bring the jurors out.

(Whereupon the jury entered the Courtroom.)

THE COURT: Now what I would like to do is this, ladies and gentlemen. There are twelve of you ladies and gentlemen who have been selected as jurors to try this case and one of you ladies and gentlemen who has been selected as an alternate juror to try the case. The alternate being Ms. Tyree whom we are not going to treat as a second class citizen. You are here to try the case only if something happens to another juror that renders them unable to do so. I would think it would be a good idea if you would be seated in the same seat every single day. What I would suggest and what I would like to have done is let you sit in the far seat there and you all could just move on down. Now you other ladies and gentlemen, whether you sit in the same seat or not, there is no law about that. That's just up to you.

• • • •

[170] I appreciate your coming and your willingness to serve as jurors in this case. Again I emphasize that this is being done because the law requires it and this is a death penalty case. I will do everything I can to make your service such as you will be inconvenienced as little as possible. Would you please go to the jury room at this time and from there you will (sic) excused and transported to the Holiday Inn. One more thing, we're going

to have juror badges that we'd like for you to wear while you are serving as jurors in this particular case. It helps us to be able to identify the jurors and I wish you would please wear them here and about the Courtroom and while you're eating and while you're at the Holiday Inn. Although we have made arrangements to have you eat in private areas I think it's good that everyone knows that you are jurors. Please give these badges out to these jurors and please wear these badges while you are serving as jurors in this case. It would help us all very much.

Mr. Edge, do you know of anything we need to take up?

MR. EDGE: Your Honor, I don't think so.

THE COURT: You'll be ready to try the case tomorrow morning at nine o'clock?

MR. EDGE: Yes, sir, we're ready.

[171] THE COURT: As you will, Mr. Mallory.

MR. MALLORY: Yes, Your Honor.

THE COURT: Can you think of anything else we need to take up now?

MR. MALLORY: No, sir.

THE COURT: There being no further business we'll recess this Court until 9:00 o'clock tomorrow morning. You may go the jury room, ladies and gentlemen.

TRIAL IN CHIEF

October 23rd, 1984

[268] THE COURT: Let the record reflect that we are here in Chambers to discuss a matter that's come to the [269] Court's attention. . . .

[270] THE COURT: One other matter we need to take up. One of Mr. Edge's motions was to the State's using all their strikes to strike blacks from being on the jury; no whites being struck, all blacks being struck. I think the record should reflect that of the strikes the State used, it did not strike all the blacks. There's a black on the jury.

MR. EDGE: Yes, sir, and if I'm not mistaken, according to my count, the State used nine of its ten preemptory challenges to strike blacks.

THE COURT: That's what the record reflects and I think of its ten that were used, one black that they did not strike is on the jury. And there was a black alternate person that could have been an alternate juror and the State did not strike that one, they struck another one, a white prospective alternate juror first, and that particular black [271] alternate was struck by you.

MR. EDGE: Yes, sir.

THE COURT: Leaving a white alternate juror.

MR. EDGE: Yes, sir.

THE COURT: That's what happened in the jury selection process. I just think that needs to be put in since

that motion was made. Of course, the motion has been denied. It doesn't matter now but I think just for the record's sake that ought to be done. You all can go in and set up and we'll be ready to go shortly.

MR. MALLORY: Your Honor, does the Court believe it would be appropriate for the State to make any kind of showing as to why those challenges were used?

THE COURT: I'm not asking for it. I'm not asking for such a showing to be made. We'll go in now.

IN THE SUPERIOR COURT FOR THE COUNTY OF
COWETA
STATE OF GEORGIA

(Caption Omitted In Printing)

Extract of hearing on motion for new trial
January 18, 1985

[31] MR. JARNAGIN: All right, Your Honor, at this time if the Court will allow us to take up the issues in the motion.

THE COURT: Sure. You want me to look at your ammendment?

MR. JARNAGIN: Yes. The ammendment (sic) to the second paragraph. The defendant's right to an impartial jury trial as guaranteed by the Sixth Ammendment (sic) to the United States Constitution was violated by the prosecutor's exercise of his preemptory (sic) challanges (sic) on a racial basis. On that point, Your Honor, we are relying on two references that appear in the record of the transcript of the trial. One, at pages 161, 162. That's one reference. Those two pages 161, 162. And the other [32] is on page 270 and 271 more specifically, that is, in the trial transcript, Mr. Edge had objected to the use of preemptory (sic) challenges by the district attorney on the basis that he was excusing black people on a basis of racial bias alone and he pointed out to the Court there and it was admitted by the State that they - well at this point he moved that they justify for the record the reason for excusing black people from the jury. And there stated his

objection, saying his failure to do so we feel would evidence the fact he is using them in a discriminatory manner. That is, excusing jurors solely because they are black and for no other reason. To that Mr. Sullivan on page 161 of the transcript responded. I would like to point out that he cannot state in his place why the district attorney may have struck a juror who happened to be black. He goes on there to argue, and it is in the record.

THE COURT: Yes, I'm following you.

MR. JARNAGIN: So there was argument but there was no showing. At that point the Court then had an observation contained in the record. It's on page 162 beginning at line 11 going down through 25. The period in the first part of line 25 where the Court essentially resolves the issue at that point in the trial. Then going on to page 270, 271 of the trial transcript, again Mr. Edge re-asserts this objection. And the Court there saying, one other matter we need to take up. One of Mr. Edge's motions was that, the State using all [33] their strikes to take blacks from the jury. No whites being struck, all blacks being struck. I think the record should reflect that of the strikes the State used it did not strike all blacks. And there it stated, the State used none of its ten preemptory (sic) strikes to take blacks off the jury. So it was that fact -

THE COURT: There was a black alternate too.

MR. JARNAGIN: Yes, a black alternate on the jury.

THE COURT: As well as a black juror.

MR. JARNAGIN: Yes, I know. There was one.

THE COURT: As well as an alternate.

MR. JARNAGIN: And a black alternate yes, sir. Under the decision of *McCrae versus Abrahms*, which is a Second Circuit opinion, December 4th, 1984. It's published in 36 Criminal Law Reporter.

THE COURT: Excuse me. There were examples in the State though, in which the State did not strike a black person and the defendant did strike a black person.

MR. JARNAGIN: Well that may be reflected in the record. That's not a portion of -

THE COURT: That happened as a matter of fact, from my memory. I haven't read the entire transcript. That did happen as a fact in the trial of the case.

MR. JARNAGIN: Well whether it did or did not [34] is not a part of my -

THE COURT: I'm sure that's not part of your motion because that's not helpful to you, so you're not going to bring out anything that's not helpful to you.

MR. JARNAGIN: Well I don't think it hurts anything but that's not the point. The point that I'm trying to make on that issue is that under this new decision of *McCrae versus Abrahms*, which I'm arguing is persuasive; it's not controlling in this State. However, it is a re-assessment (sic) by the *Second Federal Circuit Court* of the older standard in *Swain versus Alabama*. And in the *McCrae* decision, there, they state that once the defendant is able to show that there is a pattern of using the preemptory (sic) strikes to show - to strike people who are in an excludable cognascible (sic) group and there is a substantial liklihood (sic) that using these challenges against a cognascible (sic) group would deprive the defendant of a

cross section of the community, once they make this prima facie showing, then the burden shifts to the State to show that they're not using the strikes in a discriminatory fashion. And what we're seeing here is, that is a change in the law and that we believe that decision shifted the burden at that time from the defendant to the State to justify their discriminatory use of preemptory (sic) strikes. So we rely on that decision and on the -

THE COURT: What Circuit is that?

MR. JARNAGIN: Second Circuit.

[35] THE COURT: Do you have a copy of the decision?

MR. JARNAGIN: Yes, I have one if you'd like it.

MR. MALLORY: Would you read that?

MR. JARNAGIN: Well, it just got away from me.

MR. MALLORY: 36 *Criminal Law Reporter*.

THE COURT: Number 12.

Okay, do you want to respond, Mr. Mallory?

MR. MALLORY: Very briefly, Your Honor, and I will of course furnish the Court with a copy of this case. It's *Willis versus The State*, which is the present Georgia law in this matter of jurisdiction, which simply states that the Georgia Statute provides that preemptory (sic) challenges are within the discretion of the district attorney, and that statute has not been overturned or challenged or ruled un-Constitutional. I'll submit that to the Court.

THE COURT: All right. Go ahead. I'm familiar with that case. I'm not going to rule on them individually. You just go ahead and I'll either grant your motion for a new trial or will not, when you finish.

Supreme Court of Georgia.

255 Ga. 81

FORD

v.

The STATE.

No. 42154.

Oct. 29, 1985.

* * * *

SMITH, Justice.

This is a death penalty case. Appellant, James A. Ford was convicted in Coweta County of armed, robbery, rape, kidnapping with bodily injury, burglary, and murder. The case is here on direct appeal, for review under the Unified Appeal Procedure (252 Ga. A-13 et seq.), and for the sentence review required by OCGA § 17-10-35.¹ We affirm.

FACTS

The victim, Sarah Dean, managed the J & L gas station in Newnan. She usually began work at 6:00 a.m. Shortly after 5:00 a.m. on March 1, 1984, a burglar alarm went off at the station. Police responding to the call found

¹ The jury returned its verdict as to sentence on October 25, 1984. A motion for new trial was filed November 26, 1984, amended on January 7, 1985, heard January 18, 1985, and denied February 19, 1985. A notice of appeal was filed March 14, 1985, and the record was docketed in this court on March 29, 1985. The case was orally argued June 4, 1985.

the front door unlocked but nothing else out of the ordinary; however, attempts to contact Mrs. Dean were unsuccessful. Pending the arrival of the district supervisor from Marietta, the door was re-locked and the police left.

Soon afterwards, an employee of a neighboring business observed a small black male exiting J & L by a window, and contacted the police. Acting on information obtained from his mother, police questioned Steve Cox, who was found to be in possession of keys to the J & L station. Cox implicated Ford, and, shortly before 2:00 p.m., a warrant was obtained for the latter's arrest.

At approximately 3:00 p.m., Sarah Dean's automobile was located, submerged to its roof in a pond. After pulling the car out with a wrecker, police used the keys (which were in the ignition) to open the trunk, where they discovered the body of Sarah Dean.

Three hours later, Ford was arrested, after a high-speed automobile chase. He was found to be in possession of over \$2000.

Ford subsequently gave a written confession, which can be summarized as follows: He and Steve Cox, having decided to get some money to pay a fine, arrived at J & L just as the victim was preparing to leave, and forced their way into her car. Ford drove to a secluded area, where they undressed the victim and "had sex" with her. Afterwards, they put her in the trunk and drove around - buying marijuana with money they found in the victim's purse; driving to Atlanta, where Ford visited a girlfriend; and returning to Newnan, where they spent an hour in a tavern. Next they drove to a more secluded area. Ford

opened the trunk and hit the victim on the head with a road sign. Finally, they pushed the car into a pond (with the victim still in the trunk). After disposing of the victim, the two returned to J & L on foot and used the victim's keys to enter the station. Ford got "a large amount of money out of the cabinet," and left by the front door when the police arrived.

Cox testified at trial. His testimony was generally consistent with Ford's confession except he claimed that only Ford raped the victim. In addition, he testified that when they first entered the victim's car, Ford held a butcher knife to the victim's neck; that Ford threatened to kill the victim during the rape and again while they were at the tavern; that Ford responded to the victim's plea for mercy by telling her to "shut up;" and that as the car rolled into the pond, Cox could hear the victim beating on the truck-lid.

Ricky Wright testified that on the morning of March 1 he and Ford went shopping in Atlanta. En route, Ford admitted to Wright that he had burglarized J & L, raped the woman who managed it, put her in the trunk of her car and pushed the car into a pond. According to Wright, Ford was laughing and smiling as he described the crime. Wright testified that Ford had a large sum of money and gave Wright \$150.

An autopsy established that the victim had drowned. Serological examination of vaginal swabbings positively established that sexual intercourse has recently occurred. Hairs found on the victim were consistent with having come from Ford (and inconsistent with having come from Cox).

The evidence overwhelmingly establishes Ford's guilt, and, therefore, more than suffices to meet the standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

ENUMERATIONS OF ERROR

1. In his 2nd enumeration, Ford contends that the prosecutor's use of peremptory strikes to remove 9 of 10 possible black jurors denied Ford his right to a jury comprised of a fair cross-section of the community. (One black served on the jury.) Ford has shown only that a large percentage – but not all – of black prospective jurors were peremptorily struck by the prosecution in *this* case. "He has failed to establish a systematic exclusion of black jurors, leading to a general condition that black citizens do not serve on criminal trial juries in the circuit." *Moore v. State*, 254 Ga. 525, 529(2(b)), 330 S.E.2d 717 (1985). Accordingly, we find no error here.

2. Prior to trial, the state reached an agreement with Steve Cox whereby, in exchange for his truthful testimony, he would be prosecuted only for armed robbery and burglary and the state would recommend "life plus 20," or, in other words, the maximum sentences for these crimes. The state, of course, was constitutionally required to and did reveal this information to Ford. *Owens v. State*, 251 Ga. 313(1), 305 S.E.2d 102 (1983).

When Cox testified, the state lost no time in addressing this subject. When the state asked Cox what sentence he was going to get, Cox answered. "Six years." As the state prepared to refresh his recollection, the court interrupted to state: "Let me tell you right here and now

you're not going to get any six years, do you understand that?" The state then proceeded to establish Cox's understanding that the recommended sentence was going to be life plus 20 years, and not 6 years.

In his 3rd enumeration of error, Ford contends that the court's comment was an improper expression of opinion. See OCGA § 17-8-57.² We need not determine whether this code section actually was violated, inasmuch as Ford neither objected nor moved for a mistrial. *State v. Griffin*, 240 Ga. 470, 241 S.E.2d 230 (1978). We note, however, that Ford does not, even now, contest the truth of the court's comment, see *Abbott v. State*, 91 Ga.App. 380(3), 85 S.E.2d 615 (1955), or contend otherwise than that regardless of the court's comment, the state had a constitutional duty to correct Cox's misconception, see *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and if, as a result, Cox's credibility was adversely affected, Ford plainly was benefited thereby.

3. The trial court did not abuse its discretion by denying Ford's motion for sequestered voir dire. *Finney v. State*, 253 Ga. 346(2), 320 S.E.2d 147 (1984). Enumeration 5 is without merit.

4. Regarding Ford's 6th enumeration, we find that the trial court did not err by refusing to grant Ford extra

² OCGA § 17-8-57 provides: "It is error for any judge in any criminal case, during its progress or in his charge to the jury, to express his opinion as to what has or has not been proved or as to the guilt of the accused . . ."

peremptory strikes, in addition to the 20 authorized by OCGA § 15-12-165.

5. Enumeration 7 complains of the trial court's refusal to change venue. Although almost all of the prospective jurors had heard at least something about the case, in view of the limited amount of prejudicial pre-trial publicity shown in this case, and the low percentage of veniremen excused for bias, prejudice or fixed opinion (5 of 60 or 8%),³ the trial court did not err. *Devier v. State*, 253 Ga. 604(4), 323 S.E.2d 150 (1984); *Waters v. State*, 248 Ga. 355(1), 283 S.E.2d 238 (1981).

6. After his arrest, Ford gave two statements. The trial court excluded the second statement but ruled that the first statement was voluntary and admissible.⁴ In his 8th enumeration, Ford complains of the court's refusal to exclude the first statement.

Ford was advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and signed a form waiving those rights after officers read the form and explained each portion of the form as they went along. In view of the lack of any evidence of threats

³ In addition, 5 jurors who underwent voir dire were excused for prejudice or bias for or against the death penalty, and one was excused because she had served on the grand jury.

⁴ The court's original pre-trial ruling on this issue was insufficiently specific. See Pre-trial Transcript, October 12 hearing, p. 211; *Cofield v. State*, 247 Ga. 98(4), 274 S.E.2d 530 (1981). However, the court subsequently clarified its ruling. See Trial Transcript p. 350; *Parks v. State*, 254 Ga. 403(1), 330 S.E.2d 686 (1985).

or promises by the officers, or of a request for an attorney by Ford, the court did not err by finding the confession to have been voluntary.

7. We adhere to our position that the practice of death-qualification of jurors is not unconstitutional, *Mincey v. State*, 251 Ga. 255(2), 304 S.E.2d 882 (1983), despite the Eighth Circuit Court of Appeals' holding to the contrary. See *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir.1985). We agree with the Missouri Supreme Court that *Grigsby* is contrary not only to the overwhelming weight of state and federal authority but also to *Wainwright v. Witt*, 469 U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). *State v. Nave*, 694 S.W.2d 729 (Mo. 1985). Therefore, we find enumeration 9 to be without merit.

8. After trial, Ford's family retained a private attorney to represent him in the post-conviction proceedings, including the motion for new trial and the appeal. The court-appointed trial attorney was dismissed. Ford contends in his 4th enumeration of error that his trial attorney rendered ineffective assistance of counsel, particularly at the sentencing phase of the trial.

"The bench mark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, ___, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In order to prevail on an ineffectiveness claim, convicted defendant must show (1) "that counsel's performance was deficient," i.e., that counsel's performance was not reasonable under all

the circumstances, and (2) that this "deficient performance prejudiced the defense," i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at ___, 104 S.Ct. at 2064. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.*

The complaining defendant must make both showings. His failure "to establish either the performance or the prejudice component results in denial of his Sixth Amendment claim." *King v. Strickland*, 748 F.2d 1462, 1463 (11th Cir.1984). A reviewing court need not "address both components if the defendant makes an insufficient showing on one," *Washington v. Strickland*, *supra* at ___, 104 S.Ct. at 2069, nor must the components be addressed in any particular order. *Ibid.*

With the foregoing in mind, we shall now undertake to address the various acts and omissions allegedly demonstrating ineffective representation. For reasons discussed below, we consider this enumeration of error together with enumeration 1, in which Ford complains of the prosecutor's argument at the sentencing phase of the trial.

(a) Ford claims that his trial attorney, Arthur Edge IV, should have offered the "vast wealth of data now available" on the subject of the constitutionality of Georgia's death penalty law, and claims that "[c]ompetent counsel would have known that this very issue is currently awaiting *en banc* decision by the United States Court of Appeals for the Eleventh Circuit in *McCleskey v. Zant* . . ."

In view of the decision since rendered by the *en banc* Eleventh Circuit on this issue. Ford clearly was not prejudiced by any omission here. See *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir.1985) (affirming the denial of habeas relief on the ground of racial bias in the administration of the death penalty, and reversing the grant of habeas relief on another ground).

(b) Nor do we find any possible prejudice from counsel's failure to support with evidence his challenge to the practice of death-qualifying the jury. See Division 7, *supra*.

(c) Ford claims that attorney Edge made an insufficient effort to change venue. He asserts: "Competent counsel would have engaged an expert, or experts, to analyze the pretrial publicity; and to conduct a survey of the community and/or the prospective jurors to determine community sentiment. Counsel could have called numerous witnesses - being a resident of the area - to attest to the way knowledge and gossip circulate in a community of less than 40,000 people."

That counsel could have taken action that he did not does not necessarily render his performance deficient. Ford does not show how an expert analysis of pre-trial publicity could have accomplished any more than the introduction in evidence of whatever publicity existed. Nor has he explained why competent counsel could not reasonably assume that the voir dire of prospective jurors would establish community sentiment at least as well as a "survey of the community and/or the prospective jurors." (In particular, it would seem that the voir dire is a survey of the prospective jurors.)

We find no deficiency here, and in addition, Ford has not established any reasonable probability that, had the suggested additional action been taken, a change of venue would have been granted.

(d) At the guilt-innocence phase of the trial, the court charged (*inter alia*):

"Malice may be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart." (Emphasis supplied.)

"[Intent] may be inferred from the proven circumstances or by acts and conduct or it may be presumed when it is the natural and necessary consequence of the act." (Emphasis supplied.)

Attorney Edge neither objected to these instructions, nor reserved any objections to them. See *Rivers v. State*, 250 Ga. 303, 309, 298 S.E.2d 1 (1982). Ford now claims that competent counsel would have detected the "clear Sandstrom problems" with these instructions, and would have objected. See *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

We find nothing objectionable in the implied malice instruction. Compare OCGA § 16-5-1(b); *Lamb v. Jernigan*, 683 F.2d 1332, 1340 (11th Cir.1982).

As to the intent instruction, we have previously stated our preference for charges stated in terms of "inferences" rather than presumptions (except as to the defendant's sanity and, of course, his innocence). See, e.g., *Rose v. State*, 249 Ga. 628, 631, 292 S.E.2d 678 (1982).

"[T]he term 'inference' has tended to be used more frequently [than the term 'presumption'] for evidentiary devices that are permissive in nature . . . " *Lamb v. Jernigan*, supra at 1335-36 (fn. 4). Nevertheless, a "presumption" is not necessarily mandatory, and a permissive presumption is not unconstitutional so long as it is rational. *Ulster County Court v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224-25, 60 L.Ed.2d 777 (1979).

The intent instruction here "was not reasonably susceptible of an interpretation that relieved the prosecution of its burden of proving intent beyond a reasonable doubt or otherwise undermined the factfinding responsibility of the jury." *Lamb v. Jernigan*, supra at 1340 (addressing an intent instruction identical to the one given in this case).

From the foregoing, it can readily be seen that attorney Edge, was not remiss in failing to object to the above charges and that the defense was not prejudiced by the failure to object.

(e) There likewise being no error in the court's charge on conspiracy. *Anderson v. State*, 153 Ga.App. 401(3), 265 S.E.2d 299 (1980), Edge's failure to object to the charge does not show ineffectiveness of counsel.

(f) We fail to see how Edge can be condemned for failing to request a charge on prior inconsistent statements as substantive evidence. Absent instructions to the contrary, the jury surely regarded substantively all the evidence presented to it. See *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982).

(g) Ford claims that attorney Edge should have obtained an independent psychiatric evaluation of the

defendant, and should have filed a special plea challenging his competency.

Ford was evaluated prior to trial, by Dr. Donald P. Grigsby, Ph.D., chief of forensic services at the West Georgia Central Regional Hospital. Dr. Grigsby's report, included in the record, attached to the report of the trial judge (see OCGA § 17-10-35(a)), reads, in part, as follows:

"James Ford has never been a prior patient at this hospital or at Central State Hospital; he did spend one year at the Milledgeville Youth Detention Center between the age of 15 and 16. James Ford has no record of prior psychiatric treatment in the State of Georgia.

"James Ford's current mental results are as follows: he is an 18 years old black male that looks his stated age . . . Numerous scars are located on his right forearm; otherwise, no remarkable body/facial characteristics/asymmetries were noted. His eye contact was fair. No tremors or shakes or other psychomotor problems were noted. Vision and hearing appeared normal. His speech was forceful and short and to the point; he was relevant and coherent. Posture and gait were normal. His behavior during testing was attentive, he was cooperative but guarded and acted like a tough man. No impairment of memory function was seen. He was in touch with reality and his thoughts progressed from stimulus to logical conclusion. No abnormal psychiatric content of thought was noted. His affect was appropriate and flat; his mood was somewhat defiant and macho. He was oriented to time, person and place. His intellect appeared dull and his judgment slightly impaired as measured with the Mental Status Exam.

"Neurological screening was negative at this time. Emotional indicators on the Bender would suggest some anxiety.

"Intellectual assessment with the WAIS-R produced a Full Scale IQ of 73, placing him within the borderline range of intelligence. This is believed to be a valid assessment of his current level of functioning.

"Objective personality assessment was attempted but not successfully completed with the short form MMPI. The test was administered to James Ford; however, the results were invalidated by his 'faking sick.' This examiner did not detect the presence of any psychiatric disorder.

"It is the professional opinion of this examiner that James Ford is both legally competent to stand trial and criminally responsible for his behaviors. He is aware of the charges against him, he understands the nature of the judicial process, and he is able to consult with his attorney in building his defense. In regards to his criminal responsibility, it is the professional opinion of this examiner that he did and does know right from wrong and at the time of the alleged crime there was no evidence whatsoever, for a delusional compulsion."

We do not have, on this record, any testimony from Edge as to why he did not move for an independent evaluation, or file a special plea of incompetence. Thus, we can only speculate as to the extent to which Edge might have relied upon, for example, his own observations of the defendant, or other matters, in addition to the above report. In any event, a special plea of incompetence requires "a determination of whether the defendant at the

time of the trial is capable of understanding the nature and object of the proceedings against him and is capable of assisting his attorney with his defense." *Brown v. State*, 250 Ga. 66, 70, 295 S.E.2d 727 (1982). There being no indication in the record that Ford did not understand the nature and object of the proceedings or was incapable of assisting his attorney, Ford has failed to meet his burden of establishing deficiency or prejudice in the failure of trial counsel to file a special plea or to move for additional expert assistance on this issue. Compare *Lindsey v. State*, 254 Ga. 444, 330 S.E.2d 563 (1985).

(h) In a related vein. Ford contends that "crucial" mitigating evidence was "either not presented or was presented in a superficial manner which could not have informed the sentencing jury of its importance or weight."

Dr. James Thomas, a pediatrician, testified on behalf of the defense at the hearing on the motion for new trial. On November 8, 1973, when Ford was eight years old, Dr. Thomas diagnosed him as being hyperactive. He prescribed Ritalin, described in the Physician's Desk Reference (PDR) (1985 Edition) as a "mild central nervous system stimulant." *Id.* at 865. Ford took Ritalin (during the school year) for several years; Dr. Thomas last prescribed the drug on January 17, 1977 (but it was possibly refilled for a limited time afterwards).

Ford's mother testified at the sentencing phase of the trial that "he was a hyperactive kid." However, no evidence was presented at trial that Ford had taken Ritalin for this condition.

Ford calls our attention to the following warning in the PDR (p. 865):

"Drug Dependence.

"Ritalin should be given cautiously to emotionally unstable patients, such as those with a history of drug dependence or alcoholism, because such patients may increase dosage on their own initiative.

"Chronically abusive use can lead to marked tolerance and psychic dependence with varying degrees of abnormal behavior. Frank psychotic episodes can occur, especially with parenteral abuse.⁵ Careful supervision is required during drug withdrawal, since severe depression as well as the effects of chronic overactivity can be unmasked. Long-term follow-up may be required because of the patient's basic personality disturbances."

Ford argues: "Clearly, evidence that Appellant, due to his prolonged use of Ritalin, was subject to psychotic episodes was evidence which would have carried a great deal of weight with his sentence. The state's case on punishment would have been effectively rebutted by a showing of another explanation for Appellant's behavior besides that he was evil and malicious."

⁵ Ford misquotes this term as "parental" abuse, instead of "parenteral" abuse. The adjective parenteral means: "1. outside the intestine 2. brought into the body through some way other than the digestive tract, as by subcutaneous or intravenous injection." Webster's New World Dictionary of the American Language, 2nd College Edition 1970. Ritalin, offered only in tablet form, is properly taken orally.

This argument is based upon a misreading of the PDR. The quoted warning does not address itself to normal usage of Ritalin, even if "prolonged." It addresses, instead, "[c]hronically abusive use."

Not only has Ford not shown that he actually suffered psychotic episodes, he has presented no evidence of chronically abusive use which would have the potential to cause such episodes. Thus, Ford has failed to establish that he was subject to psychotic episodes due to his use of Ritalin, and, therefore, has failed to establish that Edge's performance in this respect was deficient.

(i) Finally, Ford complains of Edge's failure to object to allegedly improper argument by the state, at both phases of the trial. In addition, he contends in his first enumeration of error that the prosecutor's improper closing argument at the sentencing phase of the trial rendered the imposition of sentence fundamentally unfair, citing *Hance v. Zant*, 696 F.2d 940 (11th Cir.1983).

We begin our analysis of these complaints by observing that the portion of *Hance v. Zant* addressing prosecutorial argument has been overruled. See *Brooks v. Kemp*, 762 F.2d 1383, 1399 and 1404-1405 (11th Cir.1985); *Tucker v. Kemp*, 762 F.2d 1480, 1486 (11th Cir.1985). Compare *Conner v. State*, 251 Ga. 113(5), 303 S.E.2d 266 (1983) (expressing our disagreement with *Hance*). We find the correct approach to be as follows.

First, permissible arguments, no matter how effective, do not contravene fundamental fairness; likewise, a failure to object to permissible arguments cannot establish deficient attorney performance.

Second, where the prosecutor argues improperly and no objection is interposed, whether reversal is required depends upon an evaluation of prejudice that is undertaken in an essentially identical manner whether the improper arguments are considered directly or in the context of an ineffectiveness claim. Compare *Strickland v. Washington*, supra (prejudice is established by a showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"), with *Brooks v. Kemp*, supra (applying *Strickland* "reasonable probability" test in context of improper prosecutorial argument), and *Conner v. State*, supra (where argument not objected to, we determine only whether impropriety was so egregious that death sentence was imposed as a result of passion, prejudice or other arbitrary factor).

Thus, our evaluation of Ford's direct attack upon the prosecutor's sentence-phase argument, as well as his indirect attack upon the prosecutor's argument in general, via his ineffectiveness claim, may be undertaken by determining, first, which (if any) portions of the state's argument were improper, and, second (if improprieties are discovered), whether the improper arguments were so egregious as to require a new trial.

(i-1) The guilt-innocence phase.

Ford complains that during the prosecutor's opening statement the evidence was described as "horrible and gruesome." Since this was an accurate description, we find nothing objectionable about it, despite Ford's contention that it was argumentative and inflammatory.

Nor do we find anything objectionable in the prosecutor's comment that he wished he could show a "video tape of what happened," but since he could not, he would "try to explain it" in such a way that "if you will try to imagine in your minds as if you're watching television . . . you'll see how the case is going to be presented to you and why it's presented in a certain way."

In the prosecutor's closing argument, however, we do find improprieties, including expressions of personal opinion and a misstatement of the law.

Regarding the expressions of personal opinion, we note that Directory Rule 7-106(c) of our State Bar Canons of Ethics states in part: "In appearing in his professional capacity before a tribunal, a lawyer shall not: (3) assert his personal knowledge of the facts in issue, except when testifying as a witness; (4) assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein." 252 Ga. at 629.

"Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." Commentary to ABA Standards for Criminal Justice 3-5.8(b) (2d Ed. 1980), p. 3-89.

The prejudice emanating from such argument depends upon the context in which it is given. Although expressions of personal opinion are objectionable in any

event, and should be avoided, nonetheless, when the evidentiary facts supporting such a conclusion are cited and the conclusion follows naturally from such facts, the mere use of the phrase "I think . . ." as opposed to "I contend . . .," or "I submit . . .," or "The evidence shows . . .," is unlikely to have a strong impact on the jury's independent evaluation of the evidence. Cf. *Conklin v. State*, 254 Ga. 558, 571, 331 S.E.2d 532 (1985); *Brooks v. Kemp*, supra, 762 F.2d at 1413-1414.

Here, the prosecutor stated that he did not "think" there was "any question" but that the butcher knife Ford wielded was a deadly weapon, that he "really" did not "think" the money Ford got was worth Sarah Dean's life, and that although the jury would have a hard job deciding the case, he "imagine[d]" Sarah Dean would "swap places with [the jury] real quick." In addition, he argued: "Here we have, according to all the testimony, and I didn't know Mrs. Dean, but I think if I did I'm sure she was a fine person. I did not know her but you heard the testimony from the people that did." Finally, he stated his dislike of Steven Cox.

Each of these arguments was objectionable (and also "easily avoided").⁶ However, we find no reasonable probability that their exclusion would have changed the result at the guilt-innocence phase of the trial, even when considered in conjunction with the misstatement of the law dealt with below.

⁶ "This kind of argument is easily avoided by insisting that lawyers restrict themselves to statements such as 'the evidence shows . . . ' or something similar." ABA Standards for Criminal Justice, supra at 3-89.

The misstatement occurred when the prosecutor argued as follows: "[T]he judge will charge you, that in malice, malice aforethought, number one, that a person intends the act that he committed. If they do something - if I come and grab the podium and I push it over, I intended to do that, unless it's proven otherwise. If you see me do that you're pretty sure that's what I intended, even though you can't read my mind. So a person commits an act and by that act a person is killed; the completion of that act causes death, that's a sufficient intent . . . [T]hat is the intent that the law speaks of as to what did a person think. Did I do that action that I just discussed with you. Don't let that be confusing to you all."

This explanation was incorrect. *Francis v. Franklin*, ___ U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom v. Montana*, supra. However, the trial court's instructions on intent and malice were correct, and, considered in light of the strength of the evidence, were sufficient to cure the improper impact of the argument.

(i-2) The sentencing phase.

We do not agree with Ford's contention that the prosecutor "unfairly summarized the controversy over the . . . death penalty by focusing exclusively on retribution." Although there are other legitimate sentencing concerns, see *Conner v. State*, supra, a prosecutor is under no obligation to argue all of them.

The prosecutor did not err by noting the obvious fact that the victim was gone and would never be here again. See *Brooks v. Kemp*, supra at 1409-10. Nor did the prosecutor err by arguing: "[O]ur government has determined

that the death penalty is appropriate and necessary in certain cases and should be provided . . . It's up to you to decide if this is that type of case that deserves the death penalty." This was a correct statement of the law. His further argument that law and order depended upon the confidence of the citizenry that criminals would receive the punishment they deserved was not improper. See *Conner v. State*, supra at 120, 303 S.E.2d 266 (quoting former U.S. Supreme Court Justice Stewart's plurality and concurring opinions in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), respectively).

Finally, the prosecutor committed no impropriety by arguing that the jury was commanded "to do what is right and what is just"; by following his discussion of the heinousness of the crime with the dramatic assertion that Sarah Dean would be "in there" with the jury, asking for justice; or by concluding: "By God we draw the line somewhere and this is it folks. Enough is enough and we draw the line. You say it for Sarah Dean, say it for all of us, enough is enough. It's got to stop. Thank you."

We do not, however, find that the prosecutor's argument was devoid of impropriety.

Our major concern is not the brief expression of a personal opinion early in his argument. The effect of this impropriety clearly was inconsequential.

The more serious impropriety occurred when the prosecutor argued as follows:

"If someone wants to forgive Ford, let Sarah Dean forgive him. She is the only one who has the right to do that. She and the Lord. Don't take that right away from her. Say, well that's all right Sarah, I'm going to forgive him for what he did to you. Don't take that away. That would be the worst tragedy we could have in this court for you to do that . . .

"God is the only one who can forgive. He and Sarah Dean. Christ said you can turn the other cheek when you are hit but you can't turn the cheek for someone else. The law of God prescribes the law of man and to impose order on society we must have both . . .

"Come back with whatever you like. It's your choice. But in fact, as I said before, not only would it be a travesty but a very sick joke against Sarah Dean . . ."

It is undoubtedly true that a jury has no right to forgive a defendant. See *Felker v. State*, 252 Ga. 351, 378, 314 S.E.2d 621 (1984). The fact of conviction, however, suffices to ensure that the jury will not forgive the defendant. At the sentencing phase of the trial the question is not *whether* the defendant will be punished, it is, rather, *how much* he will be punished. Once a statutory aggravating circumstance is established, the issue is not forgiveness, it is mercy. By confusing these two terms, the prosecutor in effect argued that the jury had no right to be merciful. Such an argument is legally incorrect.

"Just as retribution is an appropriate justification for imposing a capital sentence . . . [so is] mercy . . . an acceptable sentencing rationale." *Drake v. Kemp*, 762 F.2d 1449, 1460 (11th Cir.1985).

A prosecutor is entitled to "urge vigorously that a death sentence is appropriate punishment in the case at hand . . ." *Walker v. State*, 254 Ga. 149, 159, 327 S.E.2d 475 (1985). It follows that he is entitled also to "urge vigorously" that mercy is inappropriate "in the case at hand." To argue, however, that the jury has no right to be merciful goes too far, as does the characterization of the exercise of mercy as a "travesty and a sick joke." *Drake v. Kemp*, supra. Cf. ABA Standards for Criminal Justice 3-5.10 ("The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.")

Having identified improprieties in the prosecutor's sentencing argument, we must now determine "whether there was a reasonable probability that the improper arguments changed the jury's exercise of discretion in choosing between life imprisonment or death." *Tucker v. Kemp*, 762 F.2d 1496, 1508 (11th Cir.1985).

Examining all the circumstances, we do not find a reasonable probability that, but for the improper argument, Ford would have received a life sentence.

First, as we noted above, the prosecutor had a right to argue that mercy was inappropriate in the case at hand, and much of the prosecutor's argument was devoted to a discussion of facts which supported his contention that the death penalty was called for in this case.

Second, the prosecutor did concede, albeit grudgingly, that the jury had the right to recommend a life sentence, and the defense attorney, for his part,

pointed out that he was not asking the jury for forgiveness, excuse, or pardon – he was asking only for something less than a death sentence, and he called the jury's attention to the likelihood that if the jury opted for mercy, Ford could get "four life sentences and twenty years on top of that."

Third, the trial court's instructions informed the jury that it was the latter's responsibility "to determine within the limits prescribed by law the penalty that shall be imposed," explaining that every person found guilty of murder would be "punished by death or by imprisonment for life." The court instructed the jury to consider mitigating circumstances, which the court defined as "those which do not constitute a justification or excuse for the offense of murder, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability so as to justify a sentence of life imprisonment rather than death," and further explained that the jury could provide for a life sentence whether or not it found any mitigating circumstances, "for any reason satisfactory to [the jury], or for no reason."

These countervailing arguments and instructions mitigated to a large degree, if not completely, the impropriety of the prosecutor's argument.

We note that in this case "[t]here was overwhelming evidence of guilt, thus reducing to a minimum the chance that an innocent person will be executed." *Tucker v. Kemp*, 762 F.2d 1496, 1509 (11th Cir. 1985).⁷

⁷ We note in addition that Ford testified at the sentencing phase – admitting the crimes, but asking for mercy.

Moreover, the jury found that the murder was "outrageously or wantonly vile, horrible or inhuman," and that it was committed during the commission of the additional capital felonies of armed robbery, kidnapping with bodily injury, and rape. See OCGA § 17-10-30(b)(2) and (b)(7). The victim gave Ford no reason to attack her; the crimes were entirely unprovoked, and the murder was preceded by serious physical and psychological abuse. The crime was indeed (as the prosecutor contended) "horrible."

In mitigation, it was shown that Ford had grown up without a father present, had experienced difficulty with his schoolwork, but had never before been in serious trouble. While not frivolous, these mitigating circumstances are hardly "commanding" in the face of the egregiousness of the crime. *Brooks v. Kemp*, supra at 1416. Compare *High v. Zant*, 250 Ga. 693, 694-95, 300 S.E.2d 654 (1983).

"Considered in light of all facts and circumstances of the case, the improper arguments, most of which were mitigated by other arguments and instructions by the court, were not sufficient to undermine confidence in the outcome." *Brooks v. Kemp*, supra at 1416.

(j) For the foregoing reasons, we find that neither attorney Edge's performance nor the prosecutor's improper argument justifies reversal of Ford's convictions or death sentence.

SENTENCE REVIEW

9. The jury found that the offense of murder was committed while the defendant was engaged in the

commission of the additional capital felonies of rape, kidnapping with bodily injury, and armed robbery. See OCGA § 17-10-30(b)(2). Ford was convicted of these capital felonies at the guilt-innocence phase of the trial. Just as the evidence supports Ford's conviction for these offenses, the evidence supports the jury's findings in regard to the § b(2) aggravating circumstance.

The jury also found that "the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind." See OCGA § 17-10-30(b)(7). In this case, the victim clearly suffered serious and intentionally-inflicted physical and psychological abuse. She was kidnapped, raped, stuffed into the trunk of her own car, driven around for several hours, hit on the head with a metal road sign (after pleading for her life), and pushed into a pond (still in the trunk of her car and still conscious), where she drowned. The evidence supports beyond a reasonable doubt the jury's findings of the § b(7) aggravating circumstance. OCGA § 17-10-35(c)(2). Compare *Whittington v. State*, 252 Ga. 168(9 b), 313 S.E.2d 73 (1984); *Phillips v. State*, 250 Ga. 336(6), 297 S.E.2d 217 (1982).

10. From our review of the record, including matters addressed in Division 8 of this opinion, we find that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factor. OCGA § 17-10-35(c)(1).

11. Ford's death sentence is not disproportionate to the life sentence received by co-defendant Steve Cox. See *Allen v. State*, 253 Ga. 390(8), 321 S.E.2d 710 (1984). Aside from the difference in ages (Cox was only 15 at the time

of the crime), the evidence tends to show that Ford was the more culpable of the two, i.e., that he and not Cox drove the car, raped the victim, hit her with the road sign, let the car out of gear prior to pushing it into the pond, and got the money.

In addition, Ford's death sentence is neither excessive nor disproportionate to sentences imposed in similar cases generally. OCGA § 17-10-35(c)(3). The similar cases listed in the Appendix support the imposition of the death penalty in this case.

Judgment affirmed.

All the Justices concur.

APPENDIX

Alderman v. State, 254 Ga. 206, 327 S.E.2d 168 (1985); *Allen v. State*, 253 Ga. 390, 321 S.E.2d 710 (1984); *Finney v. State*, 253 Ga. 346, 320 S.E.2d 147 (1984); *Brown v. State*, 250 Ga. 66, 295 S.E.2d 727 (1982); *High v. State*, 247 Ga. 289, 276 S.E.2d 5 (1981); *Justus v. State*, 247 Ga. 276, 276 S.E.2d 242 (1981); *Green v. State*, 246 Ga. 598, 272 S.E.2d 475 (1980); *Stevens v. State*, 245 Ga. 583, 266 S.E.2d 194 (1980); *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980); *Hardy v. State*, 245 Ga. 272, 264 S.E.2d 209 (1980); *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979); *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979); *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979); *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979); *Johnson v. State*, 242 Ga. 649, 250 S.E.2d 394 (1978); *Westbrook v. State*, 242 Ga. 151, 249 S.E.2d 524 (1978); *Morgan v. State*, 241 Ga. 485, 246 S.E.2d 198 (1978); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978).

SUPREME COURT OF THE UNITED STATES October Term 1986 No. 85-6253. JAMES A. FORD v. GEORGIA. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith v. Kentucky*, ante, p. 314. Reported below: 255 Ga. 81, 335 S.E.2d 567.

257 Ga. 661
FORD

v.

The STATE.

No. 42154.

Supreme Court of Georgia.

Nov. 30, 1987.

Reconsideration Denied Dec. 16, 1987.

SMITH, Justice.

Ford v. State, 255 Ga. 81, 335 S.E.2d 567 (1985), was pending before the Supreme Court of the United States when *Griffith v. Kentucky*, 479 U.S. ___, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), was decided on January 13, 1987. *Griffith* established the principle that the ruling in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), applied retroactively to all cases, state or federal, pending on direct review when *Batson* was decided. Thus, in keeping with *Griffith*, supra, the Supreme Court of the United States vacated its grant of Ford's petition for writ of certiorari, U.S. Supreme Court Case No. 85-6253, and on March 25, 1987, remanded the case to the Supreme Court of Georgia for further consideration in light of *Griffith v. Kentucky*, supra, ___, U.S. ___, 107 S.Ct. 1268, 94 L.Ed.2d 129 (1987).

1. *Batson* stands for the principle that a prosecutor may not strike a black juror solely because of his race, nor upon any assumption based solely upon the juror's race. 106 S.Ct. at 1723. See *Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792 (1987).

2. In *Batson*, the defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen, through the use of peremptory challenges, violated his 6th and 14th Amendment rights. The *Batson* Court observed that, "[the] petitioner made a timely objection to the prosecutor's removal of all black persons on the venire." Id. 106 S.Ct. at p. 1725. The Court also observed: "In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today." Id. at p. 1724, fn. 24. It went on to state that it expressed no view as to how a court should handle the matter, upon a finding of discrimination against black jurors, but made it clear that it must be handled in such a manner as to erase the discrimination in the jury selection.

3. *Batson* may be understood to require that any objection as to peremptory strikes be made *before* the trial of the case begins. This is further supported by *Griffith*, supra, 107 S.Ct. at p. 710, where the facts show that the motion to discharge the panel based upon a discriminatory selection of jurors was made immediately after the selection process was completed and before trial had begun. It is consistent with our holding in *State v. Sparks*, 257 Ga. 97, 98, 355 S.E.2d 658 (1987), where we held that "any claim under *Batson* should be raised prior to the time the jurors selected to try the case are sworn."

4. In this case, Ford filed a "Motion To Restrict Racial Use of Peremptory Challenges."¹ This motion was

¹ The motion was as follows: "Now comes JAMES FORD, the Defendant in the above styled action, and moves the Court

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based on the law as it existed at that time under *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)

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to restrict the Prosecution from using its peremptory challenges in a racially biased manner that would exclude members of the black race from serving on the Jury. In support of this Motion, the Defendant shows:

1.

"The Prosecutor has over a long period of time excluded members of the black race from being allowed to serve on the Jury where the issues to be tried involve members of the opposite race.

2.

"This case involves a black accused and the victim is a member of the white race.

3.

"It is anticipated that the Prosecutor will continue his long pattern of racial discrimination in the exercise of his peremptory strikes.

4.

"The exclusion of members of the black race in the Jury when a black accused is being tried is done in order that the accused will receive excessive punishment if found guilty, or to inject racial prejudice into the fact finding process of the Jury. See *McCray vs. New York*, [461] U.S. 961 [103 S.Ct. 2438, 77 L.Ed.2d 1322], 33 Cr.L. 4067 (82-1381, May 31, 1983). *Taylor vs. Louisiana*, 419 U.S. 522 [95 S.Ct. 692, 42 L.Ed.2d 690] (1975).

"WHEREFORE, the Defendant prays that this Court enter an Order granting the relief requested herein."

— that is, that the defendant must show a pattern of systematic exclusion of blacks as jurors in criminal trials within the circuit. Ford offered no proof of his contentions.

(a) The trial court denied the motion on October 10th, ten days before the trial began. In commenting upon this denial on the second day of the trial, the judge stated that he had seen "numerous or several cases" in which there were black defendants and the district attorney's office struck white prospective jurors and left prospective black jurors on the jury. "I have seen that happen here and in other counties in the circuit."

(b) After the jury had been selected and sworn in, the trial court afforded the defense an opportunity to make any necessary motions. None were made.

(c) In the direct appeal from Ford's conviction, this court found that he had failed to demonstrate a pattern of systematic exclusion of blacks from criminal juries in the circuit. *Ford v. State*, 255 Ga. 81, 83(1), 33 S.Ed.2d 567.

5. Under *Griffith*, it is now unquestioned that Ford may insist upon the *Batson* issue, notwithstanding that his conviction preceded the date of that opinion.

But nothing in *Griffith* would warrant the extension of relief upon grounds never raised at trial. Indeed, all that *Griffith* dictates is that objections made — at trial — must be resolved under the *Batson* rule, whether or not they antedated the enunciation of that rule.²

² "We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases,

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6. We have delineated a time period within which a *Batson* motion is timely.

(a) In *State v. Sparks*, 257 Ga. 97, 355 S.E.2d 658, we allowed as timely a *Batson* motion that was made shortly after the jurors had been sworn. We held that "hereafter any claim under *Batson* should be raised prior to the time the jurors selected to try the case are sworn." In *Riley v. State*, 257 Ga. 91, 94(3), 355 S.E.2d 66, we held as untimely a *Batson* motion that was made after the jury had been sworn and five witnesses had testified.

(b) Ford made no contemporaneous objection to the composition of the jury as selected. His pre-trial motion was not an objection to the jury as selected, but to an alleged pattern of systematic exclusion of black jurors. There was no objection made after the jury was sworn.

(c) Further, even if colloquy in the trial judge's chambers on the second day of trial might be interpreted as a *Batson* motion, it would not have been timely under *Riley v. State*, supra.

7. The determinative issue thus becomes whether our contemporaneous objection rule is a valid state procedural bar to Ford's *Batson* complaint.

In *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977), the United States Supreme Court held:

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state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith*, 107 S.Ct. at 709.

"A defendant has been accused of a serious crime, and [the trial] is the time and place for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the results that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification."

8. We now conclude this matter as follows:

(a) Ford's motion under *Swain*, having been decided adversely to him on appeal, cannot be reviewed in this proceeding. *Ford v. State*, supra.

(b) While the circumstances of the jury selection may raise implications under *Batson*, and are not precluded from review under the authority of *Griffith*, Ford made no objection to the composition of the jury after it was selected and before the trial commenced.

(c) The rules of our state require that a defendant who questions the composition of his trial jury must make objection "prior to the time the jurors selected to try the case are sworn." *Sparks*, supra.

(d) The failure of Ford timely to object is a valid state procedural bar to any complaint he may have under *Batson*. *Wainwright v. Sykes*, *supra*.

9. Upon remand from the United States Supreme Court, we adhere to our initial judgment of affirmance.

Judgment affirmed upon remand.

All the Justices concur except GREGORY and HUNT, JJ. who dissent.

GREGORY, Justice, dissenting.

Prior to trial, Ford filed a motion asking the trial court "to restrict the Prosecution from using its peremptory challenges in a racially biased manner that would exclude members of the black race from serving on the jury." This motion was denied by the trial court. Subsequently, the prosecutor exercised nine of his ten peremptory challenges against blacks.

On direct appeal, this court, like the trial court, ruled on the issue without having the benefit of the pronouncement of the United States Supreme Court in the since-decided case of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). See *Ford v. State*, 255 Ga. 81(1), 335 S.Ed.2d 567 (1985). Now, having held that *Batson* applies retroactively to cases, such as this one, that were tried prior to *Batson* but were still pending on direct appeal when *Batson* was decided, *Griffith v. Kentucky*, 479 U.S. ___, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the United State Supreme Court has remanded the case to us for reconsideration under *Batson*.

Today, the majority of this court holds that because Ford raised the discrimination issue before the jury selection began, it was not timely, or was not really a *Batson*-type objection at all.

While I agree that "nothing in *Griffith* would warrant the extension of relief upon grounds never raised at trial . . ." (majority at p. 765), I cannot agree that Ford never raised a *Batson*-type claim, nor do I think that we may avoid addressing the merits of a *Batson* issue that was raised at trial on the ground that it was raised too soon under a procedural rule of timeliness that we created after the case was tried.

I do not doubt that we may establish procedural rules regarding the correct time to raise *Batson* claims. But other than the general rule that issues cannot be raised for the first time after trial, no procedural rules governing the raising of *Batson* claims were in existence when Ford's case was tried, for the very simple reason that *Batson* had not yet been decided.

We say now that the *Batson* claim should have been raised after the jury was selected. There is nothing wrong with this rule. However, Ford had no way of knowing but what if he had waited until after the jury was selected to raise the issue, we would have held that he waited too late; that he should have raised the issue prior to trial, so that the prosecutor would be on notice that his exercise of peremptory challenges would be scrutinized for racial discrimination.

Because the procedural rule on which the majority relies to avoid reaching the merits of Ford's *Batson* claim

did not exist when Ford's case was tried, it cannot possibly be "the sort of firmly established and regularly followed state practice that can prevent implementation of [Ford's] federal constitutional rights." *James v. Kentucky*, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984). Moreover, such an "unannounced" and "novel application of a procedural bar of which [Ford] 'could not fairly be deemed to have been apprised . . . ' [Cf.]" will not bar "federal habeas review of this claim . . ." *Mann v. Dugger*, 817 F.2d 1471 (11th Cir. 1987).

Prior to trial, Ford moved the trial court to restrict the prosecutor from exercising his peremptory challenges in a racially discriminatory manner. The trial court denied the motion. After the jury was selected, the prosecutor offered to explain his peremptory challenges. The trial court ruled that such a proffer would be unnecessary, notwithstanding that the prosecutor has exercised nine of his ten peremptory challenges against blacks.

Inasmuch as *Batson* had not been decided when this case was tried, the trial court's rulings were understandable. Nonetheless, under *Batson* they were erroneous.

I dissent to the majority opinion. I would remand this case to the trial court to give the prosecutor an opportunity to rebut the prima facie case of discrimination under *Batson*.

I am authorized to state that Justice HUNT joins in this dissent.

SUPREME COURT OF THE UNITED STATES

No. 87-6796

James A. Ford,

Petitioner

v.

Georgia

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Georgia.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Questions 1 and 2 presented by the petition.

April 23, 1990
